

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOHAMMAD J. ABDULRAFI,

No. C 02-04702 WHA

Petitioner,

v.

**ORDER GRANTING
CERTIFICATE OF
APPEALABILITY**

BILL LOCKYER,

Respondent.

INTRODUCTION

Petitioner Mohammad J. Abdulrafi requests a certificate of appealability so that he may challenge before the Court of Appeals this Court's denial of his petition for a writ of habeas corpus. Because Abdulrafi made a substantial showing that he was denied effective assistance of counsel in violation of the Sixth Amendment, his request is **GRANTED**.

STATEMENT

Mr. Abdulrafi was convicted in 1997 in state court of lewd and lascivious acts on a child in violation of Penal Code Section 288(a). He has served his eight-year prison term. The United States deported him to Pakistan because of his conviction. His petition is not moot, despite his release, because of the disabilities (such as exclusion from the United States) that endure due to the conviction. *See Carafas v. LaVallee*, 391 U.S. 234, 237 (1968).

Petitioner first asked this Court for a writ of habeas corpus on September 27, 2002. That petition was denied March 5, 2005. Mr. Abdulrafi appealed. The Court of Appeals granted his motion to supplement the record and remanded the case for consideration of the additional

1 evidence. After a hearing, this Court denied Mr. Abdulrafi's petition again on September 6.
2 Judgment was entered against him and in favor of respondent.

3 ANALYSIS

4 A district court may grant a certificate of appealability "only if the applicant has made a
5 substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). The
6 certificate is granted if the petitioner demonstrates "that the issues are debatable among jurists
7 of reason; that a court could resolve the issues [in a different manner]; *or* that the questions are
8 adequate to deserve encouragement to proceed further." *Lambright v. Stewart*, 220 F.3d 1022,
9 1025 (9th Cir. 2000) (citations omitted). Any doubt is resolved in the petitioner's favor. *Ibid*.

10 Mr. Abdulrafi argues that a reasonable jurist could find that he was denied effective
11 assistance of counsel when his attorney turned over defense reports to the state. Representation
12 is deficient constitutionally if it is objectively unreasonable, *Strickland v. Washington*, 466 U.S.
13 668, 687-88 (1984), and when the lawyer's action or inaction hurts the defendant, *id.* at 692.
14 The reports were used by the prosecutor at Mr. Abdulrafi's trial.

15 Petitioner argues that giving the reports to the prosecutor was unreasonable. He
16 concedes that it might be reasonable, for instance to forestall objections to use of the reports at
17 trial. Petitioner claims that if this were a reasonable strategy, the defense would have turned
18 over all such reports. Defense counsel did not turn them all over. Petitioner also argues that, if
19 it were reasonable, the defense would have turned over only reports about witnesses who were
20 to be called at trial. Defense counsel turned over at least one report for a witness who did not
21 testify at trial. This Court found that there was insufficient evidence to find that defense
22 counsel's representation fell below an objective standard of reasonableness. Petitioner's
23 argument, however, may persuade other reasonable jurists. The Court therefore grants a
24 certificate of appealability as to whether defense counsel's representation fell below an
25 objective standard of reasonableness when he turned over the reports about the three witnesses,
26 Jasmyn (petitioner's daughter), Candyce and Charmaen.

27 Petitioner also contends that a reasonable jurist could find that the prosecutor's use of
28 the defense reports hurt Mr. Abdulrafi's defense.

1 Prosecutor Javier Alcala questioned Jasmyn about inconsistencies between her
2 testimony and statements she had made to a defense investigator. Petitioner argues that the
3 questioning cast doubt on her credibility, undermining potentially beneficial testimony. Mr.
4 Abdulrafi argues this caused him prejudice. This Court found that there was insufficient
5 evidence to find that petitioner was prejudiced by the prosecution's use of the report because no
6 witness contradicted Jasmyn's testimony. However, a reasonable jurist conceivably could think
7 Mr. Abdulrafi was hurt by the prosecutor's use of the report. The Court therefore grants a
8 certificate of appealability as to whether petitioner was prejudiced by the prosecution's use of
9 the report.


10 Next, petitioner contends that use of the reports about Candyce and Charmaen
11 prejudiced his case. Mr. Abdulrafi argues that Alcala used the reports to improve his
12 questioning, in part by letting him know additional facts damaging to the defense. This Court
13 found that there was insufficient evidence to find that petitioner was prejudiced by the
14 prosecution's use of the reports about Candyce and Charmaen. A reasonable jurist, however,
15 conceivably could disagree. The Court therefore grants a certificate of appealability as to
16 whether petitioner was prejudiced by the use of the reports about Candyce and Charmaen.

17 CONCLUSION

18 For the reasons above, this Court finds that a reasonable jurist conceivably could have
19 determined the constitutional issues in Mr. Abdulrafi's favor. This Court therefore **GRANTS**
20 petitioner a certificate of appealability, limited to the specific issues described above. The Clerk
21 shall transmit the file, including a copy of this order, to the Court of Appeals for the Ninth
22 Circuit.

23 **IT IS SO ORDERED.**

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25 Dated: September 30, 2005

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28 WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

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